United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-3017

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

XEROX CORPORATION,	:	Docket No. 76-3017
Defendant-Appellant,	:	
- against -	:	Appeal Pursuant to 28 U.S. COURT OF APPEALS
SCM CORPORATION,	:	
Plaintiff-Appellee.	:	
XEROX CORPORATION,	:	Docket No. 76-7131
Petitioner,	:	
- against -	:	Petition for Writ of Mandamus Pursuant to 28 U.S.C. §1651 and Fed.R.App.P. 21
HON. JON O. NEWMAN, Judge of the United States District Court for the District of Connecticut, and SCM CORPORATION,	:	
Respondents.	:	

XEROX' PETITION FOR REHEARING AND FOR REHEARING IN BANC AND, ALTERNATIVELY, MOTION FOR A STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

XEROX CORPORATION,	:	Docket No. 76-3017
Defendant-Appellant,	:	
- against -	:	Appeal Pursuant to 28 U.S.C. §1291
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Xerox Corporation ("Xerox") petitions, pursuant to Fed.R.App.P. 35 and 40, for rehearing and rehearing in banc and, in the event that rehearing is denied, moves for a stay of the mandate pursuant to Fed.R.App.P. 41(b), in respect of a per curiam decision of a panel of this Court

filed on April 15, 1976,* declining to review two pre-trial rulings by Hon. Jon O. Newman, District Judge for the District of Connecticut, which rejected the applicability of the attorney-client privilege.** These rulings have far-reaching implications not only for Xerox, but for all attorneys and their clients throughout this Circuit.

First, the District Court held that the attorney-client privilege does not apply to protect legal advice unless it reveals, expressly or by implication, secret facts communicated by the client to his lawyer. While adopting this admittedly restrictive view, the District Court acknowledged that the issue "arises in a field plagued by vague and often inconsistent judicial decisions" (Pre-Trial Ruling No. 19, p. 1), frankly admitting that a "split in authority" exists on the question (id. p. 3) -- a split which the Court found was "further complicated" in this Circuit by the "uncertain significance" of this Court's decision on rehearing in United States v. Silverman.***

*The panel consisted of Associate Justice Tom Clark (Ret.), sitting by designation, and Judges Mansfield and Mulligan.

**The materials referred to herein, except for the panel's opinion attached hereto, are contained in the Appendix filed with Xerox' original papers.

***430 F.2d (2d Cir.), modified on rehearing, 439 F.2d 1198 (1970), cert. denied, 402 U.S. 953 (1971).

Despite the District Court's explicit recognition of the uncertain state of the law, the panel declared that Judge Newman had "applied settled principles governing the attorney-client privilege," and denied Xerox a writ of mandamus (Opinion p. 3; emphasis added). Moreover, the panel held -- for the first time as far as we are aware -- that the exception created by Cohen v. Beneficial Indus. Loan Co., 337 U.S. 541 (1949), to the finality requirement of 28 U.S.C. §1291 can never be employed "to obtain interlocutory review of discovery orders." (Id.)

The breadth of the District Court's ruling is sweeping. Although it arose in the context of a few specific documents recording the legal judgments of Xerox' attorneys concerning which Xerox patents were utilized in the company's own machines, Judge Newman's order expressly mandates application of the same legal principle to all documents as to which Xerox has asserted the privilege (Pre-Trial Ruling No. 17, p. 20) -- and there are several thousands of them:

> "The Court expects that the decisions expressed in this ruling will provide sufficient guidance to the parties to enable them to resolve any remaining disputes as to the availability of the attorney-client privilege. Obviously resort to the Court every time a deposition question encounters a claim of privilege is impractical. If hereafter an issue of privilege arises in a context reasonably governed by this ruling, and a party either asserts the privilege or claims its unavailability in contravention of the decisions in this ruling, significant sanctions will be imposed."

This means that Xerox cannot invoke the privilege as to any advice from its attorneys which does not reveal a confidential fact previously communicated by the company.

Second, the District Court refused to recognize the privilege where one joint venturer conveyed to its co-venturer its attorney's advice concerning possible exposure arising from the venture's structure -- exposure which would be joint and several as a matter of law. Despite the fact that no other court had ever addressed this issue, and in disregard of the chilling effect that the District Court's ruling could have on the incentive to voluntarily remedy possible antitrust violations, the panel concluded that the ruling "does not present legal questions of first impression or of 'extraordinary significance'" (Opinion p. 3).

ARGUMENT

I.

Rehearing And Rehearing In Banc Are Warranted In The Unusual Circumstances of This Case

Rule 35(a), F.R.App.P., provides that rehearing in banc should be granted "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Both of these criteria are satisfied here. Moreover, since the panel overlooked a substantial body of authority and misapprehended the applicable legal principles, rehearing under Rule 40 is also warranted.

A. The District Court's First Ruling.

The panel stated that the District Court had "applied settled principles governing the attorney-client privilege to a complicated factual picture" (Opinion p. 3). How it reached this conclusion with respect to the District Court's first ruling -- that a legal opinion is privileged only when it reveals a secret fact communicated by the client -- is difficult to divine. Not only was a pure question of law involved, but the District Court itself admitted that the applicable legal principles were far from "settled" -- that a "split in authority" existed which was "further complicated" in this Circuit by the "uncertain significance" of this Court's decision on rehearing in the Silverman case. The panel simply disregarded a substantial body of contrary authority - including the Supreme Court's Proposed Rule of Evidence 503(b)* - which Judge Newman himself recognized supports the "broader position" that the attorney-client privilege

*That Rule states without qualification that the attorney-client privilege embraces all "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" (56 F.R.D. at 236). In his recent comprehensive treatise on evidence, Judge Weinstein notes that this statement of the privilege "is in accord with the common law view . . . ." 2 Weinstein, Evidence §503(b)[03] (1975).

protects "any legal advice from attorney to client" (Pre-Trial Ruling No. 19, p. 2).* What is more, the panel ignored Silverman's affirmative significance.

Silverman concerned a portion of an attorney's report which set forth the factual substance of certain public minutes. This Court properly held that the excerpt was not privileged because it merely recited public information and contained neither a confidential communication to a lawyer nor a confidential communication of advice from one. But Judge Moore went on to state in dictum that the privilege does not protect a communication from an attorney "unless it has the effect of revealing a confidential communication from the client . . ." (430 F.2d at 142). On motion for rehearing, however, Silverman argued that the Court had created a "novel and dangerous exception to the attorney-client privilege [by] suggesting that only secrets which are disclosed by the client to the

*The "broader position" is reflected by Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968); American Optical Corp. v. Medtronics, Inc., 56 F.R.D. 426, 430 (D. Mass. 1972). See also, e.g., the following cases upholding the privilege with respect to legal patent advice and opinions despite the fact that no secret information had been communicated by the client: Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D.454, 456 (N.D.Ill. 1974); American Optical Corp. v. Medtronics,Inc., 170 U.S.P.Q.553, 554 (E.D.Wisc. 1973); Eutectic Corp. v. Metco,Inc., 61 F.R.D. 35, 42 (E.D.N.Y. 1973); Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 50, 52, 53 (N.D. Cal. 1971); Panduit Corp. v. Burndy Corp., 172 U.S.P.Q. 46, 47 (N.D. Ill. 1971); Spray Products Corp. v. Strouse, Inc., 31 F.R.D. 244, 248 (C.D. Pa. 1962).

attorney are privileged."* Thereupon this Court specifically disclaimed any such intent and ordered the objectionable language deleted from its first opinion (439 F.2d at 1198).

Silverman is instructive not only because of what was eliminated from the initial opinion, but also because of what was left in. This is what the Court said in the paragraph directly preceding the deleted material:

> "The communication made by the client in delivering the minutes to its attorney was not a confidential communication of the contents of the minutes since those minutes are public records. Perhaps confidential communications were made at the same time, e.g., 'give me your advice as to how these minutes should be prepared in the future;' or 'tell me what is wrong with these past minutes,' but communications of this type were not revealed or ever sought to be revealed" (430 F.2d at 120-21; emphasis added).

Silverman thus recognizes that, contrary to the District Court's ruling, an attorney can give privileged legal advice based solely on public information -- whether it be minutes or patents; it is only the substance of the public information itself -- as distinguished from the advice -- that is not protected.**

*Appellant's Petition for Rehearing En Banc, p. 7.

**This is entirely consistent with Colton v. United States, 306 F.2d 633 (2d Cir. 1962), which was cited approvingly in Silverman. Colton merely held that the contents of pre-existing public documents which are "not prepared by the [client] for the purpose of communicating with [his] lawyers in confidence" acquire "no special protection from the simple fact of being turned over to an attorney" (Id. at 639). Colton did not hold that legal advice based on such public information is unprotected.

In light of Silverman, the District Court erred in adopting the narrow view of the privilege. What is more, that error involves an issue of "exceptional importance." Under the District Court's rule, the privilege does not protect that vast area of legal advice which does not turn on secrets imparted by clients but on the application of legal judgments to publicly available facts. That, of necessity, would hamper the free flow of private discourse which is the privilege's raison d'etre by discouraging the type of legal advice that the law plainly should encourage.

B. The District Court's Second Ruling.

The District Court's second ruling involved the relationship between Xerox and its joint venturer, Rank Organization ("Rank"). The Court held that the privilege did not protect a discussion between Xerox and Rank executives in which Xerox informed Rank of the substance of the advice it had received from its attorneys as to the antitrust exposure arising from the structure of the joint venture. Not only did the District Court err as a matter of law in so ruling, but the panel erred in holding that this "does not present legal questions of first impression or of 'extraordinary significance'" (Opinion p. 3).

The relevant background is simple. In 1956, Xerox and Rank created a joint venture -- Rank-Xerox -- to exploit xerographic technology abroad. Voting control was shared 50-50. In addition, Rank-Xerox received an exclusive license in a specified territory under Xerox' patents and know-how. That arrangement is alleged by SCM to constitute an illegal cartel and division of markets between the two parents. In 1969, the arrangement was cancelled, and the parties entered into a new one. The new agreement followed the receipt of advice by Xerox from its counsel concerning possible antitrust exposure emanating from the original transaction -- advice which Xerox passed on to Rank and its counsel as a reason for altering the parties' relationship.

The attorney-client privilege is not lost when the client conveys his lawyer's advice to a person with whom he shares a common interest concerning the subject matter.* On the undisputed facts outlined above, the common interest doctrine must apply because Rank and Xerox had such an interest as a matter of law. For if the joint venture arrangement gave rise to antitrust exposure to

*E.g., Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964); Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 43-46 (D. Md. 1974); In re Yarn Processing Patent Litigation, 177 U.S.P.Q. 514 (S.D. Fla. 1973); Stanley Works v. Haeger Potteries, Inc., 35 F.R.D. 551, 556 (N.D. Ill. 1964).

Xerox, the self-same exposure necessarily existed for Rank, the other party to the alleged cartel, the liability of conspirators under the Sherman Act being joint and several.

The District Court treated the issue as one of fact rather than law, saying that there had been a failure of proof on Xerox' part. That ruling proceeded from an erroneous conception of the common interest doctrine. Xerox did not have to prove that Rank or its American antitrust counsel agreed with the legal assessment of Xerox' attorneys. The only relevant question was whether that assessment, right or wrong, applied with equal force to Rank, so that Xerox was entitled to communicate it to its co-venturer without losing the privilege. That question answers itself. If Xerox was vulnerable to a charge that it conspired with Rank to restrain American foreign commerce by dividing markets, Rank, as the other voluntary party to the alleged conspiracy, was equally vulnerable. And the fact that the parties engaged in arms-length bargaining over the new arrangement's terms does not alter their antecedent common interest in avoiding joint liability under the original arrangement.

The District Court's ruling collides directly with the policy underlying the privilege. In discussing possible antitrust exposure with Rank, Xerox was not

talking to a stranger. Far from hampering Xerox' freedom to discuss legal matters with its co-venturer, the law should promote such discussions. For if one of two joint venturers receives legal advice suggesting the advisability of modifying the arrangement for antitrust reasons, public policy dictates that the advice be acted upon; and before it can be acted upon, it must be communicated to the other party.

The proper scope and meaning of the common interest doctrine has never been defined by this Court. Moreover, the doctrine's application in the circumstances of this case presents a question of first impression never before decided by any court. The problem is a recurring one of "exceptional importance" and the guidance of this Court is sorely needed.

C. The Panel's Ruling That Discovery Orders Are Never Appealable Under The Cohen Doctrine.

In denying Xerox' appeal, the panel ruled that:

> "the exception created by Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541 (1949), to the finality requirement cannot be employed to obtain interlocutory review of discovery orders." (Opinion p. 3).

This is the first time that a panel of this Court (or of any court) has held that discovery orders can never be appealed under 28 U.S.C. §1291.*

*Despite the panel's statement that this proposition is "settled" (Opinion p. 3), none of the cases on which it relied supports such an absolute prohibition. In American Express Warehousing, Ltd. v. Transamerica, Inc. Co., 380 F.2d 277 (2d Cir. 1967), Judge Feinberg stated that "an order requiring production of documents is not ordinarly

(cont'd)

Nothing in Cohen suggests a wholesale prohibition on appealability based solely on the type of order involved. The Cohen test is whether the issues raised are "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated" (337 U.S. at 546). Cohen did not hold that certain types of collateral orders can never be appealed. Rather, Justice Jackson discriminatingly determined that the order appealed from "present[ed] a serious and unsettled question" (337 U.S. at 541) and permitted review on that basis.

If it is really the law of this Circuit that discovery orders can never be appealed under 28 U.S.C. §1291, the bar is entitled to have that important message delivered by the full Court.

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appealable" (Id. at 380; emphasis added). In Shattuck v. Hoegl, 523 F.2d 569 (2d Cir. 1975), Judge Timbers merely held that the Cohen criteria had not been satisfied in the case at bar (Id. at 516). And in International Business Machines Corp. v. United States, 480 F.2d 293 (2d Cir. 1973) (en banc), cert. denied, 416 U.S. 979 (1974), where the principal issue was the appealability of a discovery order in a case governed by the Expediting Act, the four-judge majority found the Cohen doctrine inapplicable because "[n]o wide ranging issue" was presented and no "disruption of the administration of justice" could be discerned (480 F.2d at 298).

II.

In the Event That Rehearing Is Denied, The Court's Mandate Should Be Stayed Pursuant To Rule 41(b).

Even when rehearing is denied, this Court has stayed its mandate pursuant to Rule 41(b) "pending application to the Supreme Court for a writ of certiorari . . . ."* Such a stay is appropriate here.

Besides the significant substantive issues raised by the District Court's rulings, involving both a "split in authority" and a question of first impression, the panel's decision brings into bold relief a clear conflict in the Circuits over the proper scope of interlocutory review of pre-trial orders involving the attorney-client privilege. While this Court has been hostile toward such review, either by mandamus or appeal, other Circuits have been markedly more hospitable. See, e.g., Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971); Pfizer, Inc. v. Lord, 456 F.2d 545 (8th Cir. 1972).

This conflict appears to center on a basic disagreement over the impact of a denial of interlocutory review. This Court believes that such a denial will not seriously harm the appellant because, if privileged communications are erroneously disclosed, a reversal after trial will be an adequate remedy. See American Express Warehousing, Ltd. v. Transamerica Inc. Co., supra, 380 F. 2d at 281-82. The Seventh and Eighth Circuits, on the other hand,

*See, e.g., United States v. Marquez, 424 F.2d 236, 240-41 (2d Cir. 1970); United States v. Wild, 422 F.2d 34, 40 (2d Cir. 1969). See also Johnson v. Mississippi, 421 U.S. 213, 218 n. 7 (1974).

take a diametrically contrary view. As the Seventh Circuit stated in granting review in Harper & Row:

> "[B]ecause maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (423 F.2d at 492).*

It cannot be fairly said that the issue raised by this conflict, as well as the substantive questions presented by the District Court's rulings, are "so frivolous" and "devoid of substance that four members of the [Supreme] Court may not wish to hear the case argued when the proposed petition for certiorari reaches the Court." Sklaroff v. Skeadas, 100 L.Ed. 1524, 1525 (1956) (Frankfurter, J.).** In these circumstances, a stay of the mandate under Fed.R.App.P. 41(b) is clearly warranted.***

Moreover, the "competing equities" here "tip in favor" of a stay pending Xerox' application for a writ of certiorari. See MacLeod v. General Electric Co., supra, 17 L.Ed.2d at 47. Such a stay will not delay the trial of this action. Even if the District Court adopts SCM's proposed timetable, the trial

*Accord, Pfizer v. Lord, supra, 456 F.2d at 548.

**Indeed, in Harper & Rowe, four Supreme Court Justices voted to affirm the Seventh Circuit over the express argument that the Court had violated "the Congressional prohibition against piecemeal appellate review," and that "[a] writ of mandamus is a singularly inappropriate remedy with respect to discovery orders entrusted to the sound discretion of the trial judge in complex antitrust cases . . ." (Brief for Petitioners, p. 12).

***See also, e.g., American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 17 L.Ed.2d 37, 39 (1966) (Harlan, J.); MacLeod v. General Electric Co., 17 L.Ed.2d 45, 46 (1966) (Harlan, J.); English v. Cunningham, 4 L.Ed.2d 42, 43 (1959) (Frankfurter, J.).

will not commence for another year.* The remaining discovery and pre-trial preparation can proceed apace pending determination of Xerox' certiorari petition. On the other hand, if a stay is denied and the privileged information in question is disclosed (as well as all other privileged communications governed by the District Court's rulings), Xerox will be harmed irreparably. For if Xerox is correct, "an appeal after disclosure of the privileged communication is an inadequate remedy." Harper & Row Publishers, Inc. v. Decker, supra, 432 F.2d at 492. Moreover, in the several years intervening before final judgment, lawyers and clients in this Circuit will be left in doubt as to the matters which they can freely communicate to each other without fear of public disclosure, thereby deterring the seeking of legal advice.

CONCLUSION

For all the foregoing reason, Xerox respectfully requests that this Court grant its peition for rehearing and rehearing in banc and reverse the District Court's rulings, or in the event that such rehearing is denied, stay its mandate pursuant to Fed.R.App.P. 41(b) pending Xerox' application for a writ of certiorari.

Dated: April 21, 1976

Respectfully submitted,

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A Member of the Firm

*SCM has proposed a trial date of April 15, 1977; Xerox' proposed date is October, 1977.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1060, 1061 September Term 1975

Argued: April 13, 1976 Decided: April 15, 1976

Docket Nos. 76-3017, 76-7131

- - - - - - - - - - - - - - - - - - - -x

XEROX CORPORATION,

Defendant-Appellant,

-against-

SCM CORPORATION,

Plaintiff-Appellee.

- - - - - - - - - - - - - - - - - - - -x

XEROX CORPORATION,

Petitioner,

-against-

HON. JON O. NEWMAN, Judge of the United States District Court for the District of Connecticut, and SCM CORPORATION.

Respondents.

- - - - - - - - - - - - - - - - - - - -x

Before CLARK, Associate Justice,* MANSFIELD and MULLIGAN, Circuit Judges.

Attempted appeal from pretrial discovery orders issued by the United States District Court for the District of Connecticut, Jon O. Newman, Judge, and petition for a writ of mandamus staying the operation and effect of the orders.

Appeal dismissed for lack of jurisdiction. Petition for writ of mandamus denied.

* Supreme Court of the United States, retired, sitting by designation.

STANLEY D. ROBINSON, Esq., New York, N.Y. (Milton Handler, Esq., Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., Kenyon & Kenyon Reilly Carr & Chapin, New York, N.Y., Cummings & Lockwood, Stamford, Conn., John R. Murphy, Esq., Stamford, Conn., of counsel), for Defendant-Appellant.

STEPHEN RACKOW KAYE, Esq., New York, N.Y. (Ira B. Brudberg, Esq., David L. Belt, Esq., W. Thomas Fagan, Esq., Richard M. Gelb, Esq., Proskauer Rose Goetz & Mendelsohn, New York, N.Y., Widett, Widett, Slater & Goldman, P.C., Boston, Mass., Jacobs, Jacobs & Grudberg, P.C., New Haven, Conn., of counsel), for Plaintiff-Appellee.

PER CURIAM:

In this litigation between two giants of the office copying industry, which was begun in 1973 when SCM Corporation (SCM) brought an action against Xerox Corporation (Xerox) in the District of Connecticut seeking damages for alleged antitrust violations, and declaratory and injunctive relief with respect to certain patent and license agreements, Xerox seeks to appeal from two pretrial discovery orders issued by Judge Jon O. Newman with respect to documents and information claimed to be protected from disclosure by the attorney-client privilege. In the alternative, Xerox petitions pursuant to 28 U.S.C. §1651 and Rule 21, F.R.A.P., for a writ of mandamus staying the operation and effect of the orders.

In recent years we have repeatedly sought to make clear that in the absence of a certification pursuant to 28 U.S.C. §1292(b) or of a showing of "persistent disregard of the Rules of Civil Procedure," Will v. United States, 389 U.S. 90, 96 (1967), or of "a manifest abuse

of discretion," Baker v. United States Steel Corp., 492 F.2d 1074, 1077 (2d Cir. 1974), on the part of the district court, no jurisdictional basis exists for interlocutory review of pretrial discovery orders of the type here presented. See 28 U.S.C. §1291; International Business Machines Corp. v. United States, 480 F.2d 293 (2d Cir. 1973) (en banc), cert. denied, 416 U.S. 979 (1974); American Express Warehousing, Ltd. v. Transamerica Insurance Co., 380 F.2d 277 (2d Cir. 1967); Shattuck (IBM) v. Hoegl (Xerox), 523 F.2d 509 (2d Cir. 1975).

No such showing is made here and Judge Newman understandably refused to certify his rulings for appeal pursuant to 28 U.S.C. §1292(b). This case does not present legal questions of first impression or of "extraordinary significance," 380 F.2d at 282. Furthermore, the record indicates that the district judge, far from being guilty of usurpation of power, invoked and painstakingly applied settled principles governing the attorney-client privilege to a complicated factual picture. Xerox's attack upon the viability of Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), which it bases on our later decision in United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), modified on rehearing, 439 F.2d 1198 (1970), cert. denied, 402 U.S. 953 (1971), hardly warrants interlocutory review. It is further settled that the exception created by Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541 (1949), to the finality requirement cannot be employed to obtain interlocutory review of discovery orders. See American Express Warehousing, supra, 380 F.2d at 280; Shattuck, supra, 523 F.2d at 516. In view

of the applicability of such well-established jurisdictional principles, further explication is unnecessary. "Occidit miseros crambe repetita magistros," Juvenal, Satires. Sat. vii, l. 154 (Gifford, tr.).

The attempted appeal is dismissed for lack of appellate jurisdiction. The petition for a writ of mandamus is denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

XEROX CORPORATION, Defendant-Appellant, -against- SCM CORPORATION, Plaintiff-Appellee.	Docket No. 76-3017 AFFIDAVIT OF SERVICE
XEROX CORPORATION, Petitioner, -against HON. JON O. NEWMAN, Judge of the United States District Court for the District of Connecticut, and SCM CORPORATION, Respondents.	Docket No. 76-7131

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT THATCHER, being duly sworn, deposes and says that he is employed by the law firm of Kaye, Scholer, Fierman, Hays & Handler, is over the age of twenty-one years and not a party to this action.

1. On the 21st day of April, 1976, deponent served true copies of Xerox' Petition for Rehearing and Xerox' Opposition to SCM's Motion, annexed hereto, by depositing same, enclosed in sealed postpaid wrappers in the post office box regularly maintained by the U.S. Postal Service at 425 Park Avenue, New York, New York, addressed to the following attorneys:

Widett, Widett, Slater & Goldman, P.C.
100 Federal Street
Boston, Mass. 02110

Jacobs, Jacobs & Grudberg, P.C.
207 Orange Street
New Haven, Connecticut 06503

Robert Thatcher

Sworn to before me this
21st day of April, 1976

Notary Public

RICHARD J. HALLORAN
Notary Public, State of New York
No. 60-4616593
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires March 30, 1977

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FRIEDMAN KOLLER KREITZ & MENDELSOHN
ATTORNEYS FOR
BY HAND
BY MAIL